

OCT 27 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
No. **77-797**

HERBERT O. LA MORDER,)

Petitioner,)

vs.)

SHERRILL E. LA MORDER,)

Respondent.)

PETITION FOR WRIT OF CERTIORARI

RAYMOND O. GROSS
Suite 210 - Legal Arts Building
501 S. Fort Harrison Avenue
Clearwater, Florida 33516
—
Phone (813) 443-0405

RICHARD M. ROBBINS
Suite 211-Legal Arts Building
501 South Fort Harrison Avenue
Clearwater, Florida 33516

Phone: (813) 441-1522

Counsel for Petitioner

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IN THE

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No. _____

HERBERT O. LA MORDER,)
Petitioner,)
 vs.)
 SHERRILL E. LA MORDER,)
Respondent)

PETITION FOR WRIT OF CERTIORARI

The Petitioner, HERBERT O. LA MORDER, pursuant to Rule 23 of the Rules of The Supreme Court of the United States, presents this his Petition for Writ of Certiorari seeking review of a decision of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit was dismissed on June 30, 1977, at which time the Fifth Circuit entered its Order granting the Respondent's Motion to Dismiss Appeal, and Petitioner's Motion for Rehearing was denied on July 29, 1977. The Respondent in her Motion to Dismiss Appeal asserted that the Fifth Circuit was without jurisdiction to entertain the appeal on the ground that the appeal was not taken from a final judgment, decision or other appealable order of the Federal District Court.

Jurisdiction

This appeal is predicated upon the provisions of the Fifth and Fourteenth Amendments of the United States Constitution.

Specifically, Petitioner contends that the custody Order which has been the basis of all appeals taken in this matter was and is in violation of the Petitioner's right of due process of law in that the effect of the order was to take the Petitioner's child from him and place the child in the custody of the Respondent without the Petitioner ever having been afforded a hearing in the State Trial Court. Petitioner has maintained in both the Federal District Court proceedings, which were initiated by a Petition for Writ of Habeas Corpus, and in the ensuing appeal to the Fifth Circuit Court of Appeals that the Federal Courts do have jurisdiction to entertain petitions for writs of habeas corpus in child custody cases where the custody of a child has been changed from one parent to another without due process of law being afforded to the parent who loses custody of the child as a result of the Order. The case of *In re: Burrus*, U. S. Sup. Ct., (1890), 135 U. S. 586, and the case of *Wales v. Whitney*, U. S. Sup. Ct., (1885), 114 U. S. 564, stand for the proposition that where the Petitioner has exhausted his remedies in the State Courts, and where the child was taken from the Petitioner in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, the Federal Courts do have the authority to entertain Petitions for Writs of Habeas Corpus in child custody cases.

Questions Presented

The questions submitted for review by the Supreme Court are:

A. Whether the Federal Courts have jurisdiction to entertain petitions for writs of habeas corpus in child custody cases; and

B. Whether the Federal Courts have the power to nullify a child custody order entered in a State Court when the order was entered as to one of the parties in violation of due process of law.

Statement of the Case

The following is a brief statement of the case and of the facts:

A. This appeal is based upon the entry of an Order by the United States Court of Appeals for the Fifth Circuit entered on June 30, 1977, wherein the Fifth Circuit granted the Respondent's Motion to Dismiss on the grounds that the Fifth Circuit did not have jurisdiction to entertain the appeal. The appeal to the Fifth Circuit was based upon the entry of an order by the United States District Court, Middle District of Florida, Tampa Division, dismissing the Petitioner's Petition for Writ of Habeas Corpus. Petitioner, in his Petition for Writ of Habeas Corpus asked the United States District Court to direct the Respondent to show cause why she should not surrender the custody of the minor child of the parties to the Petitioner on the grounds that the child had been taken away from the Petitioner without due process of law.

Summary of Lower Court Proceedings

The following is a summary of the relevant proceedings which took place in the State Court and the Federal District Court:

A. The Petitioner was given the permanent custody of the minor child of the parties by virtue of the Final Judgment of Divorce which was entered in the above cause on December 30, 1968.

B. After further legal proceedings, the Respondent filed a Petition for Modification of Final Judgment In So Far As Child Custody Is Concerned wherein she asked the Court to award her the custody of the minor child of the parties.

C. On November 22, 1972, a trial was held, in part on the Respondent's Motion For Modification; however, as can be seen by examining the transcript of said trial the trial was not completed because the Petitioner did not present his case at that time, it being stated by the Court that he could do so at

a later date.

D. Subsequent to the partial trial of November 22, 1972, depositions of certain of Respondent's witnesses were taken by the attorney who represented the Respondent at the time.

E. On April 9, 1973, the Court *in an ex parte proceeding* entered an Order changing the custody of the minor child of the parties from the Petitioner to the Respondent.

F. The Petitioner filed his Motion to Set Aside Order of April 9, 1973, on March 19, 1974, wherein he sought to set aside the said Order on the grounds that the said Order was entered in violation of the Petitioner's right to due process of law.

G. On April 15, 1974, a hearing was held before the Honorable Robert L. Williams on the Petitioner's said Motion to Set Aside Order of April 9, 1973.

H. On May 16, 1974, the Court entered an Order dismissing the Petitioner's Motion to Vacate.

I. The Second District Court of Appeal confirmed the ruling of the Trial Judge; and thereafter Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of the State of Florida. Certiorari was denied.

J. On January 7, 1977, the United States District Judge after several Status Hearings, and after reviewing the recommendations of the United States Magistrate entered an Order dismissing the Petitioner's Petition for Writ of Habeas Corpus.

Petitioner would point out to this Honorable Court that the questions of due process were raised at each stage of the proceedings including the appeals in the State Courts.

Argument

The following is a summary of the argument presented by the Petitioner at each stage of the appellate proceedings:

It is and has been the contention of the Petitioner that the

United States District Court has jurisdiction over the custody matter and related issues raised in the Petition for Writ of Habeas Corpus filed in the United States District Court and that an examination of the Court file of the Sixth Judicial Circuit, Pinellas County, Florida, which contains all of the State Court Custody pleadings, transcripts and other Court documents reveals that the State Trial Court's Order of April 9, 1973, which took the Petitioner's child from him *was entered in violation of the Petitioner's right to due process of law*. Therefore, the custody of the minor child of the parties was taken from the Petitioner in violation of due process of law, and the United States District Court has the power and jurisdiction under the Fifth and Fourteenth Amendments to the United States Constitution to vacate the State Trial Court's Order changing the custody of the minor and restoring the minor child to the Petitioner.

CONCLUSION

Based upon the authority stated above, it is the contention of the Appellant that the United States District Court should have made a finding that the Petitioner's child was taken from him without due process of law and that the United States District Court had the power under the authority of the Fifth and Fourteenth Amendments to the United States Constitution to enter an Order ordering that the custody of the child of the parties be restored to the Petitioner on the basis that the State Court's custody Order which took the child from the Petitioner violated the Petitioner's right to due process of law. Petitioner realizes that the best interest of the child are involved, and Petitioner realizes that the child is not a party to this action. However, Petitioner as a result of the State Court's Order with

no notice to the child or to the Petitioner and without the child's interest being properly considered in the State Court custody proceeding.

Respectfully submitted

Richard M. Robbins
Suite 211-Legal Arts Building
501 South Fort Harrison Avenue
Clearwater, Florida 33516

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U. S. Mail to Mr. William J. Castagna, Attorney for Respondent, 227 South Garden Avenue, Clearwater, Florida 33516, this 25th day of October, 1977.

RICHARD M. ROBBINS

APPENDIX

Order

Appeal from the United States District Court for the Middle
District of Florida

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss the appeal
is granted.

Order

On August 6, 1975, a complaint, styled "petition for writ of habeas corpus," was filed by Herbert O. La Morder as "Petitioner" (not as "next friend") against Sherrill E. La Morder, his former wife, concerning custody of their daughter, a minor. This matter was initially considered by the United States Magistrate, pursuant to general order of assignment, who has filed his Report recommending that the petition be dismissed, without prejudice.

Petitioner claims that due process of law was not accorded during a State Court child custody proceeding, which resulted in an Order transferring custody of the minor child from Petitioner to Respondent, because Petitioner was not given notice of the hearing which led to such Order. During proceedings before the Magistrate (and before any rulings on jurisdiction or exhaustion of State remedies), Counsel for both parties stipulated, in open court, that in a further custody proceeding in State Court Petitioner need only shoulder the burden of showing that awarding custody to him would best serve the interest of the child. Petitioner subsequently communicated to the Court that "he did not want to have a custody hearing in the State Court but that he wanted the U. S. District Court to rule on the question of due process which is the basis of the Petition for Writ of Habeas Corpus." However, the Magistrate deemed this irrelevant, as a ruling by this Court in Petitioner's favor would not result in the relief envisioned in the letter; a hearing in State Court would still be in order for that is the proper forum for resolution of the custody question (as distinguished from the constitutional propriety of the procedures by which that determination is made). The Magistrate therefore recommended that the cause be dismissed, without prejudice to the institution of a new action in this Court should the State Courts fail to recognize the stipulation, because Respondent has stipulated to the relief which would be accorded upon a finding in favor of Petitioner, thereby vitiating

any constitutional "case or controversy."

Upon independent examination of the file the Court agrees with the Magistrate that the Stipulation accords Petitioner all relief he could have hoped for in this action, particularly in light of the fact that the minor child is not the petitioning party. Accordingly, the Magistrate's Report is adopted and confirmed and by reference made a part hereof; and it is

ORDERED AND ADJUDGED that the cause is DISMISSED, without prejudice.

DONE AND ORDERED at Tampa, Florida, this 7th day of January, 1977.

/s/ W. Terrel Hodges

DISTRICTED
DEC 27 77

Supreme Court, U. S.

FILED

DEC 23 1977

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-797

HERBERT O. LA MORDER,)

Petitioner,)

vs.)

SHERRILL E. LA MORDER,)

Respondent.)

SUPPLEMENTAL APPENDIX

RAYMOND O. GROSS
Suite 210-Legal Arts Building
501 South Fort Harrison Avenue
Clearwater, Florida 33516

Phone: (813) 443-0405

RICHARD M. ROBBINS
Suite 211-Legal Arts Building
501 South Fort Harrison Avenue
Clearwater, Florida 33516

Phone: (813) 441-1522

COUNSEL FOR PETITIONER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1374

(Filed July 29, 1977)

HERBERT O. LA MORDER,

Petitioner-Appellant,

versus

SHERRILL E. LA MORDER,

Respondent-Appellee.

- - - - -

Appeal from the United States District
Court for the Middle District of Florida

- - - - -

Before AINSWORTH, MORGAN and GEE, Circuit
Judges.

B Y T H E C O U R T :

IT IS ORDERED that appellant's motion
for rehearing of the Court's order of
June 30, 1977, is /s/ denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1374

(Filed June 30, 1977)

HERBERT O. LA MORDER,

Petitioner-Appellant,

versus

SHERRILL E. LA MORDER,

Respondent-Appellee.

- - - - -

Appeal from the United States District
Court for the Middle District of Florida

- - - - -

Before AINSWORTH, MORGAN and GEE, Circuit
Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to
dismiss is /s/ granted.

/s/LRM
/s/Raa
/s/Tgg
6/23/77

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HERBERT O. LA MORDER,)
 Petitioner,)

vs.) INTERIM ORDER

SHERRILL E. LA MORDER,)
 Respondent.)

This cause coming on to be heard before me on Petition and Answer and after argument and Stipulation in open Court of counsel for the respective parties that in any further proceeding brought in the State Court for change of custody of the child of the parties hereto, that no greater burden shall be imposed upon Herbert O. LaMorder than to show that the best interests of the child will be served by a change of custody and the further Stipulation that in any such proceeding, the Circuit Judge may have an in camera private interview with the child of the parties for the purpose of considering the

preference of the child in determining the custodial parent, and being otherwise fully advised in the premises it is hereupon

ORDERED:

1. That the foregoing Stipulations of the parties through their respective counsel are hereby approved and accepted by the Court, and the respective parties are bound thereby.

2. That further proceedings herein are abated pending further ruling by the State Circuit Court on the issue of custody.

DONE AND ORDERED in Chambers at Tampa, Florida this 14th day of September, 1976.

/s/ Paul Game, Jr.
UNITED STATES MAGISTRATE

Copies Furnished To:

Mr. William J. Castagna

Mr. Richard M. Robbins

Supreme Court, U. S.

FILED

OCT 27 1977

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

NO. **77-797**

HERBERT O. LA MORDER,

Petitioner,

v

SHERILL E. LA MORDER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MACKENZIE, CASTAGNA, BENNISON
& GARDNER

227 South Garden Avenue

P.O. Drawer 2137

Clearwater, Florida 33517

Attorneys for Respondent

OPINIONS BELOW

The opinion and Order of the United States District Court for the Middle District of Florida and the Order of the United States Court of Appeals for the Fifth Circuit are appended to the Petition. The Order of the United States Court of Appeals dated June 30, 1977 denying a Motion for Rehearing is not attached to the Petition.

JURISDICTION

Petitioner has not alleged any basis of jurisdiction in this Court. Respondent has raised in the District Court the jurisdictional objection that Petitioner failed to even utilize, let alone exhaust, available State Court remedies in failing to file a Motion for Rehearing or even appeal

the April 9, 1973 Order and has failed to file Petition for Habeas Corpus in State Court or to even attempt to file a petition for custodial change in State Court.

QUESTIONS PRESENTED

Petitioner's questions are clearly unrelated to any issue raised by the Order of the United States Court of Appeals to which this Petition is directed. The questions presented are simply:

1. Did the Circuit Court of Appeals err in dismissing an appeal from an interlocutory order of a District Court.
2. Did the Circuit Court

of Appeals err in dismissing an appeal from a District Court suit in which no "case or controversy" exists.

ARGUMENT

Petitioner alleges in Paragraph 2 of the Petition that:

"Petitioner seeks review of a decision of the United States Court of Appeals for the Fifth Circuit."

and in Paragraph 7A that:

"This appeal is based upon the entry of an Order by the United States Court of Appeals for the Fifth Circuit entered on June 30, 1977 wherein the Fifth

Circuit granted Respondent's Motion to Dismiss on the grounds that the Fifth Circuit did not have jurisdiction to entertain the appeal".

It affirmatively appears from the Order of the District Court attached to the Petition that said Order is not a final order from which a plenary appeal could be taken, but is merely an interlocutory order and the Court of Appeals had no jurisdiction to entertain the appeal. USCA 28 sec 1291, 1292;

It also affirmatively appears from the District Court Order that because the Respondent stipulated to all of the relief to which Petitioner was entitled, there was no longer any "case

or controversy" in that Court.

The Petitioner may, tomorrow, file in the State Court a petition to obtain custody of the child and upon a showing that it will be to the child's best interest so to do, the Petitioner must prevail. No substantial federal question is present here nor can one be contrived to exist simply because of Petitioner's insistence that his presumed "rights" transcend the courts polestar concern with the best welfare of the child.

As to the questions presented in the Petition filed herein, an affirmative answer in no way requires the intervention of this Court any more than it would "require" the District Court to grant the relief requested. Simply

because a court has the "power" or "jurisdiction" to act does not "require" that they so act. The function of *parens patriae* is a State function as opposed to a Federal function and so long as the District Court preserved and protected the child's best interest in permitting the State Court to make the determination of the proper custodial parent, there was no need for it to invade the province of the State.

Petitioner seriously persists in seeking the assistance of our judicial system to enforce his demands that we blindly tear this child from her mother's arms and fling her to father because four and a half years ago a Circuit Judge may have made a procedural mistake.

CONCLUSION

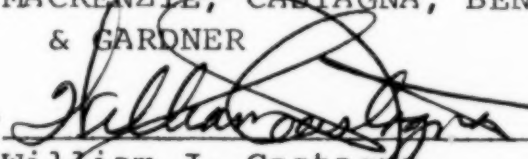
It is respectfully urged that Petitioner has wholly failed to sustain his burden under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of Federal law which has not been, but should be, settled by this Court, nor has the Court of Appeals decided a Federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals decision was a proper one. The

Petition for Writ of Certiorari should be denied.

Respectfully submitted,

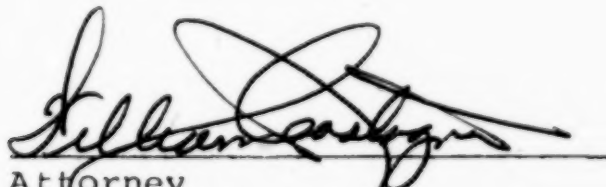
MACKENZIE, CASTAGNA, BENNISON
& GARDNER

By


William J. Castagna
227 South Garden Avenue
P.O. Drawer 2137
Clearwater, Florida 33517
(813) 442-5181
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY forty copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari has been furnished to the Supreme Court of the United States and three copies of said Brief have been furnished to Mr. Richard M. Robbins, Attorney for Petitioner, 501 South Fort Harrison Avenue, Clearwater, Florida 33516, by U. S. Mail this 23rd day of November, 1977.


Attorney